



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

CRS

Docket No: 5564-98

2 May 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Naval Reserve, filed an application with this Board requesting, in effect, that his naval record be corrected to show that he was never reduced from DS2 (E-5) to DSSN (E-3). He also requests a correction to show an entitlement to 30 days of additional leave.

2. The Board, consisting of Messrs. Zs Salman, Rothlein and Beckett, reviewed Petitioner's allegations of error and injustice on 19 April 2000 and, pursuant to its regulations, a majority determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application was filed in a timely manner.

c. Petitioner enlisted in the Navy on 9 August 1993 at age 18. On the same date, he extended his enlistment contract for 24 months. He then served for about 44 months without disciplinary incident. During this period, he was advanced to the rate of DS2. In 1995, he reported for duty aboard USS HEWITT (DD 966).

d. Petitioner's record reflects that on 12 April 1997 he received nonjudicial punishment (NJP) for disorderly conduct, drunkenness, and being incapacitated for duty. The punishment

imposed consisted of forfeitures of \$200 per month for two months, restriction and extra duty for 45 days, and a suspended reduction in rate to DS3 (E-4).

e. On 15 June 1997 STG3 R turned himself into the Naval Criminal Investigative Service (NCIS) for drug abuse. At that time he also named three other individuals who were using drugs, STG2 P, STG3 F, and STG3 B. Petitioner was not named by STG3 R at this time. However, on 19 June 1997 STG3 R accused several other individuals of using drugs, including Petitioner. One of the individuals accused of drug abuse in this second statement was DCFN (E-3) W. Concerning Petitioner, STG3 R stated as follows:

(Petitioner)....I have seen him do "speed" once about five or six weeks ago in Sonar 4. Myself, (Petitioner) and (STG3 B) were present. (Petitioner) has spoken to me about using "speed" several times. The total amount used between us was about one-third of a 0.5 gram baggie. We smoked the "speed" by... making an aluminum foil cylinder wrapped around a pencil. (B) provided the "speed"... (Petitioner) was going to buy some "speed" from (B) but changed his mind.

f. On 20 June 1997 Petitioner was interviewed by NCIS and denied any involvement with drugs.

g. On 25 June 1997 DCFN W stated to NCIS, in part, that:

.... I also smoked marijuana in Sonar Four aboard the USS Hewitt during the winter months of 1995, I cannot recall the exact date. (STG3 F), (SN A), and (STG3 B) were present also. (F), (A), and (B) were also smoking marijuana at this time. (Petitioner) was also present, but I cannot remember if he was smoking the marijuana with us. (Petitioner) did watch (F), (A), and (B), and I smoke the marijuana.

h. On 23 and 24 July 1997 STG3 B and STG3 F made written statements to the effect that they had never seen Petitioner use drugs.

i. On 24 July 1997 Petitioner was again interviewed by NCIS and again denied any involvement with drugs.

j. On 25 July 1997 the suspension from the 12 April 1997 NJP was vacated and Petitioner was reduced in rate to DS3. On that same day, Petitioner received a second NJP for use of methamphetamine and failure to obey a lawful general order, in that he failed to report the use of illegal drugs aboard HEWITT.

The punishment imposed consisted of forfeitures of \$575 per month for two months, restriction and extra duty for 45 days, and reduction in rate to DSSN. It appears that STG3 R and DCFN W were at the NJP and repeated their incriminating statements.

k. A special enlisted evaluation report for the period 16 March to 24 July 1997 was prepared due to the two NJPs. That evaluation assigned an adverse mark of 1.0 in the marking category of military bearing and character and mentioned the two NJPs and the reduction in rate to DSSN.

l. On 30 July 1997 Petitioner appealed the 25 July 1997. In the appeal, he once again stated that he had no involvement with drugs. He also noted that both STG3 B and STG3 F stated they never saw him use drugs, thus contradicting the statements of two other drug abusers, STG3 R and DCFN W. Petitioner also submitted a statement from SN A to the effect that he had not seen Petitioner use drugs nor heard of such use. Also attached to the appeal were a number of character references, including one from a chief warrant officer and one from a chief petty officer.

m. In his endorsement on Petitioner's appeal, HEWITT's commanding officer (CO) stated, in part, as follows:

In considering the facts of this case, I placed strong credence in the testimony of two independent witnesses, both of whom have earned my trust and proven themselves to be truthful, knowledgeable, and credible informants in several other drug cases adjudicated under these same circumstances. These two witnesses offered very honest and sincere testimony about two separate occasions when (Petitioner) ingested drugs or was present when illegal drugs were being used by other sailors.

DCFN (W) is the first witness against (Petitioner). DCFN (W) states that (Petitioner) was present in Sonar Four when he [DCFN (W)] and three other sailors smoked marijuana. With the exception of (Petitioner), all sailors accused in this incident have pled guilty at Special Court-Martial to use of illegal drugs. In my opinion, this conveys great veracity to DCFN (W)'s statement. DCFN (W) did not receive any mitigation to his punishment in exchange for his statement. At Special Court-Martial, he was ordered to be discharged from the Navy under Other Than Honorable conditions.

The other witness against (Petitioner) is STG3 (R). His testimony as to the facts throughout this NCIS investigation has been accurate without exception. For example, of the eight people (not including (Petitioner)) STG3 (R) has accused of drug offenses,

one is awaiting Special Court-Martial, one is awaiting General Court-Martial, and the other six have pled guilty at Special Court-Martial.

In addition to the evidence above, another fact I considered at (NJP) was (Petitioner's) recent disciplinary history. He was found guilty of Disorderly Conduct due to Drunkenness and Incapacitation for the Performance of Duties at (NJP) on 12 April 1997. While he swore that he had not been drinking, he could not explain his erratic behavior and inability to stand his watch. I now believe that his odd behavior leading to that 12 April (NJP) appearance was not alcohol induced, but drug induced.

In his appeal, (Petitioner) has attached enclosures ...which attempt to refute the facts. I place little or no weight on these enclosures. These statements and enclosures were submitted by individuals who have been accused by NCIS of similar drug offenses, tested positive for drug abuse through urinalysis, or have confessed to possessing/using illegal drugs.

n. On 19 August 1997 the Commander, Destroyer Squadron FIFTEEN denied Petitioner's appeal as it related to the charge of using methamphetamine. However, he stated that although Article 1137 of Navy Regulations requires service members to report any offenses they may observe, the directive specifically excepts from liability those individuals who are already criminally involved in such offenses at the time the offenses came under their observation. Accordingly, the Commander set aside the offense of failure to obey a lawful general order.

o. Due to Petitioner's drug involvement, an administrative discharge board (ADB) was convened on 2 December 1997. Although the ADB considered the statements of STG3 R and DCFN W, neither of these individuals testified. Out of the six witnesses that appeared before the ADB on Petitioner's behalf, three testified that they thought STG3 R was strange, odd, and of poor character. The other three spoke highly of Petitioner and could not believe he would use drugs. Petitioner testified that he had never used drugs. The ADB found no misconduct and recommended retention.

p. The record reflects that Petitioner was advanced in rate to DS3 on 16 July 1998. On 8 August 1999 he was honorably separated and transferred to the Naval Reserve. His DD Form 214 shows that he did not lose any leave.

q. In an attachment to his application, Petitioner once again asserts his innocence of the charges against him, and states the evidence supporting the no misconduct finding of the ADB is

overwhelming. He characterizes the actions of the NCIS and the command as "a witch hunt". He further states that the command did not let him take 30 days of leave that had been previously approved.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, a majority of the Board, consisting of Messrs. Rothlein and Beckett, concludes that Petitioner's request warrants partial relief, specifically, removal from the record of the NJP and vacation action of 25 July 1997. Along these lines, the majority believes these adverse actions were based not so much on a neutral and detached assessment of the evidence, but on a theory of guilt by association.

The majority first notes that the only evidence against Petitioner consists of the uncorroborated statements of STG3 R and DCFN W. The majority is extremely hesitant to ratify any sort of adverse action, even acknowledging that the applicable standard of proof is a preponderance of the evidence, when the incriminating evidence is so scant. Further, the accusers here are both drug abusers, clearly individuals whose credibility is suspect, especially STG3 R.

Not only are the accusers suspect, but the majority notes that there is significant exculpatory evidence--the statements of STG3 B, STG3 F and SN A. STG3 R alleged that STG3 B was present when Petitioner allegedly used methamphetamines. However, STG3 B later stated that he has never seen Petitioner use drugs. Likewise, DCFN W said that STG3 F and SN A were there when drugs were used in Petitioner's presence. However, these individuals have also submitted exculpatory statements.

The majority is aware that these individuals who have submitted statements to the effect that Petitioner is not a drug abuser are arguably just as "dirty," as those who have accused him of such activity. However, the majority believes there is no demonstrable reason why the latter should be believed and the former discounted.

The majority notes the numerous character references submitted on Petitioner's behalf during the NJP and ADB processing. Although Petitioner received a previous NJP, the majority is aware that there is no reliable indication that he was a drug user before the incriminating statements at issue.

Finally, the majority notes the finding of the ADB that Petitioner did not commit misconduct due to drug abuse. The majority is aware that such a finding is not binding on the Board, and does not require corrective action since the vacation action and NJP of 25 July 1997 are separate actions from the ADB,

and a contrary finding by the ADB does not invalidate the former actions. However, the majority believes that the ADB "got it right" when the members exonerated Petitioner and directed his retention in the Navy.

The majority notes Petitioner's request for entitlement to additional leave, but notes that his DD Form 214 shows that he was eventually permitted to take all of his accrued leave. Accordingly, the majority concludes that no corrective action is warranted concerning this issue.

MAJORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the court memoranda (P601-7R) of 26 and 28 August 1997 documenting the NJP and vacation action of 25 July 1997.

b. That the record be further corrected to show that Petitioner was never reduced in rate from DS2 to DS3, or from DS3 to DSSN. The record should then show that he served in the rate of DS2 from the date he was first advanced to that rate until he was released from active duty on 8 August 1999.

c. That the record be further corrected by removing the special enlisted evaluation report for the period 16 March to 24 July 1997.

d. That no further relief be granted.

e. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

f. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

MINORITY CONCLUSION:

The minority member of the Board, Mr. Zsalman, disagrees with the majority and concludes that no corrective action should be taken. He believes that the record reflects that the CO carefully considered the evidence before deciding to take the adverse actions of 25 July 1997, and those actions were reasonable.

Mr. Zsalman would first point out that in a case involving drug abuse such as the one at issue, law enforcement officials such as NCIS agents are usually required to use the statements of drug abusers to implicate other such abusers. This is so because drug

use does not take place in the open, and other users are the only ones present. In this regard, Petitioner's case is unremarkable.

Mr. Zsalman is mindful of the other statements that purport to exonerate Petitioner of the allegations of misconduct. However, as the majority notes, these statements are also from individuals involved in drug abuse. Mr. Zsalman believes the CO, in his endorsement on Petitioner's appeal, set forth a convincing rationale for believing STG3 R and DCFN W, and disbelieving STG3 B, STG3 F and SN A. Along these lines, Mr. Zsalman believes it is extremely important to note that the standard of proof at NJP is a preponderance of the evidence and not the more rigorous standard of beyond a reasonable doubt.

Although the ADB came to a contrary conclusion from the CO when it found no misconduct, Mr. Zsalman notes, as did the majority, that this finding does not compel a recommendation for relief. Mr. Zsalman believes that even if the ADB renders such a finding, the finding of misconduct by the CO at NJP should not be disturbed unless the CO was arbitrary and capricious, or the ADB considered evidence which was not before the CO when he imposed NJP. In this case, Mr. Zsalman believes the CO's decision at NJP was reasonable. Additionally, the CO actually considered evidence not available to the ADB, since STG3 R and DCFN W repeated their allegations at the NJP hearing, and the CO had an opportunity to evaluate their credibility. The ADB considered only their written statements.

Additionally, the minority agrees with the majority that Petitioner's request for an additional 30 days of leave should be denied.

Accordingly, Mr. Zsalman concludes that corrective action is not warranted.

MINORITY RECOMMENDATION:

That no relief be granted.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder


ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.


W. DEAN PFEIFFER

MAJORITY REPORT APPROVED:



MAY 25 2000

~~MINORITY REPORT APPROVED:~~

CHARLES L. TOMPKINS
Deputy Assistant Secretary of the Navy
(Personnel Programs)